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Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

343

NEW YORK CITY HOUSING AUTHORITY, IRA S. ROBBINS, SIMEON GOLAR, and ARAMIS GOMEZ*,

Petitioners,

against

PEDRO ESCALERA and ROSE ESCALERA,

Respondents.

(*Continued on back*)

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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249 Press of Fremont Payne, Inc., 417 Canal St., N. Y.—966—6570

NEW YORK CITY HOUSING AUTHORITY, IRA S. ROBBINS, SIMEON GOLAR and ARAMIS GOMEZ*,

Petitioners,

against

ROSE LEE ROLLE,

Respondent.

NEW YORK CITY HOUSING AUTHORITY, IRA S. ROBBINS, SIMEON GOLAR and ARAMIS GOMEZ*,

Petitioners,

against

WALTER LOCKMAN and VIOLA LOCKMAN,

Respondents.

NEW YORK CITY HOUSING AUTHORITY, IRA S. ROBBINS, SIMEON GOLAR and ARAMIS GOMEZ*,

Petitioners,

against

CLARENCE HUMPHREY, PHYLLIS HUMPHREY, and FANNIE HAYWOOD,

Respondents.

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* The above-named officials now hold the positions as the members of the New York City Housing Authority, and supersede the officials originally named as defendants in the proceedings below, i.e., Francis V. Madigan and Albert A. Walsh. Rule 48(3), Rules of the Supreme Court.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, New York City Housing Authority and the individual members thereof, respectfully pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Second Circuit entered in the cases herein on April 29, 1970, which reversed judgments entered in the District Court in favor of petitioners.

Opinions Below

The opinion of the Court of Appeals, as yet unreported, appears in Appendix A, pp. 1a-25a. The opinion of the District Court is unreported and appears in Appendix B, pp. 26a-37a.

Jurisdiction

The judgments of the Court of Appeals were entered on April 29, 1970 and appear in Appendix D, p. 41a. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

Questions Presented

1. Whether the administrative procedures, followed by the Authority for termination of public housing tenancies, satisfy the requirements of due process under the Fourteenth Amendment.

2. Whether the availability to the tenant of an Article 78 proceeding in the New York courts to review the Authority's action and determine whether it is illegal, arbitrary or unreasonable, satisfies any residual requirements of constitutional due process with respect to the Authority's procedures.

3. Whether the Court of Appeals should properly have reached or passed upon the constitutional issues raised in these cases when there was no dispute as to the material facts upon which the administrative proceedings were predicated.

4. Whether additional rent charges provided for in the Authority's lease with its tenants, which become legally enforcible by the Authority only after a full scale *de novo* trial in the Civil Court where every defense is available to the tenant, requires a prior administrative adversary hearing before the Authority may assert its claim and bring suit.

5. Whether under the complex procedures established by petitioner for termination of tenancies, the issues raised by respondents should first be adjudicated by the courts of New York under the principle of abstention.

6. Whether the Court of Appeals was correct in ruling that a proper cause of action, vesting jurisdiction in the federal District Court pursuant to the Civil Rights Act, 42 U.S.C. § 1983, had been established by the complaints when, at best, only property rights are involved.

7. Whether the Court of Appeals was correct in reversing the judgment, in effect summary judgment, granted by the District Court in favor of the Authority.

8. Whether the Court of Appeals was correct in holding that a *prima facie* basis for a class action had been established.

Constitutional Provisions and Statutes Involved

The constitutional provision involved is the Fourteenth Amendment to the United States Constitution.

The federal statutes involved are 42 U.S.C. § 1983, 28 U.S.C. §§ 1343(3), 2201 and 2202, Appendix M, pp. 125a-127a. The New York State statutes involved are N. Y. Civil Practice Law and Rules, §§ 7803 and 7804(d), Appendix M, pp. 126a-127a; Real Property Actions and Proceedings Law, § 743, Appendix M, p. 127a.

Statement of the Case

A.

The respondents in these four actions, consolidated below for the purpose of the appeals, are tenants in occupancy at various low-rent housing projects (hereinafter Tenant or Tenants) owned and operated by the petitioner New York City Housing Authority (Authority). In the several purported class actions brought by the Tenants in the District Court for the Southern District of New York, pursuant to the Civil Rights Act, 42 U.S.C. § 1983, they claim violation of their rights under the Fourteenth Amendment and they seek money damages, injunctions, and declaratory judgments against the Authority. Jurisdiction is invoked under 28 U.S.C. §§ 1343(3), 2201 and 2202. It is claimed that these alleged violations occurred in connection with the termination of their tenancies in the Authority's public housing projects and by the assertion of additional rent charges by the Authority.

Respondents have alleged, *inter alia*, that the written notices of the reasons for termination of tenancy were constitutionally insufficient, that Authority procedures failed to afford these Tenants an opportunity to confront and cross-examine witnesses on whom the Authority relied in terminating their tenancy, that there was an improper use of items in the respective tenant folders reputedly unknown to the respondents and on which the Authority had relied in terminating tenancies, and that they were denied access to a Tenant Review Board Handbook which deals with Authority procedures for terminating tenancies on the ground of Non-Desirability. It was also alleged that the Authority's failure to follow adversary procedures in regard to the assertion of additional rent charges was a violation of due process.

The Authority brought on motions pursuant to Rule 12(b) of the Federal Rules of Civil Procedure to dismiss the actions for, *inter alia,* failure to state a claim upon which relief could be granted, lack of jurisdiction, lack of a substantial federal question, failure to exhaust administrative remedies, and upon the ground that the federal courts should abstain from considering these actions pending a determination, by New York State courts in the first instance, of the questions raised herein.

Affidavits and documentary evidence were submitted by the respective parties, and on October 31, 1968, District Judge Sylvester J. Ryan rendered an opinion which granted the Authority's motions and dismissed the actions on the merits.

The respondents took an appeal to the Court of Appeals, Second Circuit, which rendered an opinion and entered judgments on April 29, 1970 which reversed the judgments of the District Court and remanded the actions to the District Court for consideration of respondents' motions for preliminary relief and for trial on the merits. By order made on June 4, 1970, the Court of Appeals, Second Circuit, stayed the issuance of the mandate pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure.

B.

Public housing authorities face a difficult problem in coping with families whose conduct is undesirable, objectionable, or in violation of reasonable regulations governing operation of public housing projects. This problem is accentuated by the large concentration of children and elderly persons in public housing projects. The development of a suitable living environment conducive to sound family and community life would be endangered, if not defeated, unless appropriate measures are taken against the undesirable conduct of problem tenants (see affidavit

of Ira S. Robbins, Appendix K, p. 117a). Congress is fully aware of this serious problem, and its concern is reflected in the report of the House Committee on Banking and Currency on the Housing and Urban Development Act of 1969 (see Appendix L, p. 123a).

Practices and procedures of the Authority with respect to tenant occupancy and termination of tenancy have been developed over the more than three decades that its public housing program has been in effect. Apartments are leased for a term of one month. Each lease is automatically renewed for additional terms of one month, unless either party terminates the tenancy by one month's notice in writing. Continued occupancy depends upon compliance with Authority regulations. Tenants are entitled to reasonable safeguards against arbitrary action by the Authority in terminating their tenancies, and the Authority has therefore developed detailed procedures over the past thirty years that are intended to give fair and adequate consideration to the rights of tenants.

Copies of these procedures were submitted to the District Court in support of the Authority's motions to dismiss the complaints, and appear at Appendices E and F, pp. 45a-59a.

The tenancy of *Humphrey* was terminated on the ground of Non-Desirability. The proceedings against *Rolle*, also charged with Non-Desirability, were suspended. The tenancy of *Escalera* was terminated for Breach of Rules and Regulations. The co-plaintiff in the *Escalera* action, *Gallagher*, died during the pendency of the appeal. *Lockman*, *Haywood*, *Humphrey* and *Escalera* claim that the Authority violated their constitutional rights under the Fourteenth Amendment in respect to the imposition of additional rent charges.

With respect to termination of tenancy for Non-Desirability, the Authority showed by affidavit of the

Vice-Chairman of the Authority, Ira S. Robbins, and by printed procedures submitted with its affidavits in support of its motions to dismiss, that a detailed procedure existed which the Court of Appeals found "admittedly satisfy the requirements of the Department of Housing and Urban Development circular of February 7, 1967, considered by the Supreme Court in *Thorpe* v. *Housing Authority of the City of Durham*, 393 U. S. 268 (1969)." (Appendix A, p. 12a).

Such procedures require the manager of the housing project to write to the tenant and request him to attend an interview in every instance where an incident occurs which may become the basis for termination of tenancy. At the interview the manager is required to state the reasons for the interview, explore them with the tenant insofar as they may possibly lead to termination of tenancy, secure the tenant's explanations, and caution the tenant to correct the matter(s) complained of. After the interview the manager may recommend termination of the tenancy if he finds the incident, or accumulation of incidents, of sufficient gravity under the Authority's established standards governing desirability of tenants. (See Appendix G, pp. 64a-68a.) In the event that the manager recommends termination of the tenancy, he so informs the tenant at another interview, and the tenant is invited to submit any data or documentary evidence which he considers appropriate for his defense. The manager thereupon is required to submit to the Authority's Tenant Review Board (hereinafter TRB) the tenant folder together with his summary report and recommendation for the termination of the tenancy, and the tenant's answer thereto and documents submitted by him, if any.

The report of the manager is concerned solely with the incidents and the matters which had occurred in the past,

and regarding which the manager had either conducted an interview with the tenant or requested an interview appointment which the tenant failed to keep. (See TRB Handbook, p. 23, Appendix G, p. 88a).

The manager's report and recommendation together with the tenant's answer are forwarded to TRB at the central office of the Authority. There they are considered by a body of officials consisting of the Chairman, who is one of the three members constituting the Authority, a representative of the Legal Department, a representative of the Management Department, the Administrator of the Board, a representative of the Community Affairs Division, a representative of the Community and Social Services Department and two housing project managers.

After reviewing the record TRB may reject the manager's recommendation, may require further investigation, may order the case held in status quo, or may direct a social evaluation report to be made. When TRB is of the view that consideration of termination of tenancy is appropriate the tenant is so notified, and informed that he may request a hearing before the TRB. If he responds affirmatively he receives a letter which specifies a date for the hearing, sets forth the standards established by the Authority for determining Non-Desirability (Appendix G, p. 92a), and outlines the general nature of the non-desirable action or conduct involved. As above set forth, this had previously been discussed at the project between the manager and the tenant and had been summarized by an entry in the tenant folder. The tenant is further informed that he may have the assistance of an attorney or other person at the hearing to be scheduled. The Authority's proof in the *Rolle* case (which is admitted in the *Rolle* complaint) showed that the tenant was offered access to the tenant folder upon request in order to again acquaint her and her counsel with the incidents and conduct

which were the subject matter for consideration by TRB. Adjournments are granted to tenants if they need more time to prepare their cases after they have been advised of the matters presented to TRB.

Under Authority procedures, the chairman of the TRB has the power to issue subpoenas and swear witnesses in any case where the circumstances dictate that such action be taken.

At the TRB hearing the TRB administrator recites the incidents or conduct to be considered by the Board. The tenant and his counsel may submit such written documents and data as they wish, and may present any oral reply with respect to the matters under consideration. They may also present witnesses who may make oral statements. If the TRB determination is adverse to the tenant, the action of the TRB is reviewed by the Chairman of the TRB, who is a Member of the Authority. If approved, the tenant and his counsel are so informed and the project manager is directed to serve a 30-day Notice to Vacate, pursuant to the monthly lease. This was the procedure followed in respect to the *Humphrey* case. In the *Rolle* case Mrs. Rolle and her counsel appeared at the TRB hearing and presented a list of demands (which had already been provided in summary form), including a request for advance written notice of the charges, that a stenographic transcript of the proceeding be kept, that persons with actual knowledge of the charges be present for confrontation or cross-examination and in addition, that an impartial hearing examiner be used. When these demands were rejected, Mrs. Rolle and her counsel refused to go forward with the hearing. The Authority having suspended further action pending the outcome of these cases, no TRB determination was made in the *Rolle* case.

With respect to *Escalera*, the complaint admitted (Complaint, par. VI, Appendix N, p. 132a) that a dog had been harbored over a period of years in violation of the Authority's regulations. Under the Authority's regulations such conduct constitutes a ground for termination of ten-

ancy, denominated as Breach of Rules and Regulations. The manager of the project, being unable to persuade the tenant to remove the dog from the premises, and not receiving requested proof from Mr. Escalera that he had done so, recommended termination of the tenancy. In accordance with procedure in such cases (See Appendix E, p. 111a), the tenant answer, the tenant folder, together with the report of the manager were forwarded to a Reviewing Official, who is a high administrative official of the Authority. The Reviewing Official made a determination that Escalera was ineligible for continued occupancy and he authorized termination of the tenancy.

With respect to *Lockman*, the Authority's procedure for asserting additional rent was brought into question on a constitutional basis. *Humphrey, Haywood* and *Escalera* also complain of the additional rent charges. *Lockman* was charged as additional rent $2 by reason of his son playing ball on Authority property; $5 for his son's riding a bicycle on Authority walks; and $2 for a ball-playing incident, which was reduced to $1 after reconsideration was requested by the Lockmans. These additional rent charges were paid. The Authority's basis for the additional rent charges is the lease agreement and the Tenant Rules and Regulations, each signed by the tenant, copies of which are annexed as Appendices I and J, pp. 100a-107a. (See par. 2x, Tenant Rules and Regulations, Appendix J, p. 106a). The Authority's printed procedure for the assertion of such additional rent charges requires the project manager to call the tenant in for an interview to discuss the matter. A copy of the procedure appears in Appendix H, pp. 97a-99a. If the manager is satisfied that a basis exists for the assertion of such a charge, the tenant is informed that the amount claimed, which is required under the Tenant Rules and Regulations to be a reasonable charge, will be added to the rent obligation payable the following month. If the tenant refuses to

make such payment, the Authority is required to institute legal action in the Civil Court of the City of New York in order to recover it. Upon the trial of the action in the Civil Court the Authority must prove its claim *de novo*. The Humphreys were charged $3 additional rent for a toilet stoppage and the co-plaintiff in the *Humphrey* action, *Haywood,* was charged $5 for the actions of her brother in dirtying the project premises. The brother was not a tenant and did not live in the project. Subsequent charges against this tenant and *Escalera* were withdrawn at the intervention of counsel.

Reasons for Granting the Writ

Summary

1. The opinion of the Second Circuit lays down novel and unprecedented guidelines to be followed by public housing authorities in administrative proceedings for the termination of tenancies in public housing. These extend due process requirements far beyond those made by this Court, by the Supreme Court of Illinois, and by the Third Circuit. They further conflict with decisions of the New York State Court of Appeals.

2. The Authority's termination of tenancy proceedings in each of the cases under which its procedures are challenged were founded upon established, undisputed facts. In *Humphrey* and *Ralle* there were criminal convictions; in *Escalera*, a dog had admittedly been kept by the tenant for years in violation of Authority regulations. Under these circumstances the procedural due process requirements laid down by the Second Circuit in respect to Notice, Cross-examination, and Findings were supererogatory, and its holding was nothing more than an advisory opinion on abstract, hypothetical issues which this Court has consistently ruled should not be adjudicated in a constitutional context.

3. The Second Circuit ruling conflicts with principles of law, long established by this Court, that the availability of judicial review by a state court of an administrative determination before it becomes legally effective, satisfies any residual due process requirements of the Fourteenth Amendment.

4. The Second Circuit holding that the additional rent charges claimed by the Authority (which can be recovered only after a *de novo* trial in the Civil Court of the City of New York), requires an adversary-type hearing at the administrative level, is not mandated by due process, and is in conflict with established law enunciated by this Court.

5. The Second Circuit refused to apply the principle of abstention, to afford the New York State courts the opportunity in the first instance to pass upon the issues raised herein with respect to administrative procedures, in accordance with rulings made by this Court, as recommended by the Third Circuit in *Randell* v. *Newark Housing Authority, infra,* and thereafter applied by the District Court of New Jersey in that case.

6. The conclusions of law enunciated by the Court of Appeals have established far-reaching principles which will extend beyond the reach of the present litigation to the more than two thousand public housing authorities throughout the country. A number of cases involving these issues are now pending in Federal and State courts. The effect of the Court of Appeals decision is too monumental to be allowed to remain the law of the case without affording the Authority a full opportunity to challenge its soundness. Important questions of procedural due process, decided for the first time by an appellate court with respect to public housing, require consideration and clarification by this Court before becoming established as the law of the land. The sweeping generalizations of the opinion, coupled with a remand for consideration of the issuance of a temporary injunction on a class action basis, may radically alter existing procedures of this Authority and housing authorities throughout the country before this Court will have an opportunity to review the question. If certiorari is not granted administrative action in these areas of activity may be inhibited, if not paralyzed. Under the constraints of the Second Circuit opinion the District Court will be readily persuaded that the law of the case has been established, and that it only remains for the lower court to implement the principles stated in the opinion. The tenor of the opinion has placed extremely difficult, if not insurmountable, obstacles to the Authority's defenses at the trial.

ARGUMENT

I

A.

The procedures established by the Authority exceed the requirements laid down in the HUD circular of February 7, 1967, as described in *Thorpe* v. *Housing Authority of the City of Durham*, 393 U. S. 268 (1969). With respect to *Humphrey* and *Rolle*, the procedures afforded to them also exceeded the procedures followed in *Randell* v. *Newark Housing Authority*, 384 F. 2d 151 (1967), cert. denied *sub nom.*, *Avent* v. *Newark Housing Authority*, 393 U. S. 870 (1968), a Civil Rights Act suit brought by public housing tenants, and in *Chicago Housing Authority* v. *Stewart*, 43 Ill. 2d 96, 251 N. E. 2d 185 (1969), cert. denied, 397 U. S. 1000, March 23, 1970. In regard to termination of a public housing tenancy for undesirability, the Third Circuit in *Randell*, because it vacated the stay and preliminary injunction theretofore granted in favor of the tenants, appeared to sustain procedures followed by the Newark Housing Authority which afforded the complaining tenants there substantially less than what this petitioner provides for its tenants at a TRB hearing. Likewise, the procedures followed by the Chicago Housing Authority in terminating the Stewart tenancy allowed the tenant considerably less in the way of adversary-type procedures than are afforded by this Authority.

Consequently, there now exists a significant difference and conflict in holdings made in the area of procedural due process involving the termination of public housing tenancies between the Second Circuit, the Third Circuit and the Illinois Supreme Court, and more particularly, with respect to the specific issues of procedural due process decided in these cases by the Second Circuit. Moreover, in

both the *Randell* and *Stewart* cases, despite the absence of findings, of formal notice, of cross-examination and confrontation which the Second Circuit ruled was mandatory under the Fourteenth Amendment, this Court denied review requested by the petitioning tenants.

Issues of procedural due process must be determined according to "The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished —these are some of the considerations that must enter into judicial judgment." *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U. S. 123, 163 (1951), Frankfurter, J., concurring. "The very nature of due process negates any concept of inflexible procedure universally applicable to every imaginable situation." *Cafeteria Workers* v. *McElroy*, 367 U. S. 886 (1961). In *Cafeteria Workers*, *supra*, this Court stated that the Fifth Amendment, and by inference, the Fourteenth Amendment ". . . does not require a trial-type hearing in every conceivable case of government impairment of private interest." *Cafeteria Workers*, 367 U. S. at 894. See also *Hannah* v. *Larche*, 363 U. S. 420, 442-443 (1960). In the present cases, in the absence of any material issue pertinent to the grounds for termination of the respective tenancies, there was no constitutional basis for invoking the full panoply of a trial-type hearing in order to comply with procedural due process.

B.

Countless administrative determinations are reached by informal administrative procedures. (*Davis, Discretionary Justice*, 1969, pp. 98, 118, 186). Recent decisions of the Court of Appeals of New York authorize and sanction the use of informal administrative procedures wherein hearsay

evidence may be received and considered. In *125 Bar Corp. v. State Liquor Authority,* 24 N.Y. 2d 174, 179, 247 N. E. 2d 157, 299 N.Y.S. 2d 194 (1969), the New York court adjured New York administrative agencies to use common sense and a fair approach in using such materials, with such use depending in each case upon the circumstances and qualities of such materials. In *Colton* v. Berman, 21 N. Y. 2d 322, 329, 284 N. E. 2d 679, 287 N.Y.S. 2d 647 (1967), it was held that in matters pertaining to rent control and valuation of property made for the purpose of establishing residential rents, a full evidentiary hearing is not required nor are findings necessary. The New York Court of Appeals has sanctioned informal administrative proceedings as valid to support an administrative determination, but it it has not hesitated to enforce other standards where it found that constituional requirements of due process so dictated. *Hecht* v. *Monaghan,* 307 N. Y. 461, 470, 121 N. E. 2d 421 (1954); *Wignall* v. *Fletcher,* 303 N. Y. 435, 440, 103 N. E. 2d 728 (1952); *Stuart* v. *Palmer,* 74 N. Y. 183, 190-191, 30 A. R. 289 (1878).

C.

The Second Circuit predicated its decisions in the present cases upon the reasoning and conclusions of this Court in *Goldberg* v. *Kelly,* 397 U. S. 254 (1970). The *Goldberg* case and the present cases, however, are quite dissimilar, and the reasoning by analogy of the Court of Appeals in these cases was not warranted. (See *Cohens* v. *Virginia,* 6 Wheat. 264, 399 (1821)). The ruling in *Goldberg* v. *Kelly,* which deals with impecunious welfare recipients whose sole source of subsistence had been terminated by welfare authorities, was brought into the present cases in its entirety without any attempt to differentiate or distinguish the circumstances, and the nature of the governmental action, taken against the Tenants herein. Although the Second Circuit cited the established principle that the nature of the governmental function in-

volved, and the species of private interest which is affected by the governmental action, must be weighed in each particular situation, no effort to weigh or evaluate these decisive factors was in fact made by that court.

In *Goldberg* v. *Kelly*, the crucial factor which impelled the majority of this Court to reach its due process conclusions was the desperate, irremediable plight of a welfare recipient whose financial means to live and survive is summarily withdrawn. This vital, distinctive factor is entirely lacking in the cases involving termination of tenancy, and certainly with respect to the assertion of additional rent charges. The administrative procedures attacked here are only the inception of a long process which takes many months before removal of the tenants from the premises is effected, during which judicial review is available. (See affidavit of Ira S. Robbins, Appendix K, pp. 113a-114a.)

The procedures considered by this Court in *Goldberg* had been only recently adopted. The procedures now before the Court have been in effect for many years and provide for a review procedure, which in cases of Non-Desirability affords an additional opportunity for a personal appearance with counsel and to produce witnesses.

Furthermore, needy eligible persons and families have an absolute right under law to receive public financial assistance. On the other hand, not all eligible and needy applicants for public housing in New York City can be admitted to public housing projects due to the lack of sufficient public housing units. Admission depends upon a schedule of priorities based upon need. (See *Holmes* v. *New York City Housing Authority*, 398 F. 2d 262, 263 (2 Cir. 1968)).

Questions touching upon the serious impact of non-desirable tenant behavior upon other tenants and of conflict between tenants by reason of mandated adversary proceed-

ings for termination of tenancy, were not considered by the Second Circuit. These considerations were not present in the *Goldberg* case, where the impact of deprivation of welfare benefits was solely upon the recipient involved.

It has been stated "The Due Process Clause does not disregard vital differences." *In re Groban*, 352 U. S. 330, 337 (1957), Frankfurter, J., concurring. The foregoing distinctions were neither examined nor considered by the second Circuit when it ruled that the principles set forth in *Goldberg* v. *Kelly* were fully applicable to termination of public housing tenancies and assertion of additional rent charges.

The possible consideration of the foregoing factors by the District Court on remand is precluded by the direction of the Court of Appeals which explicitly singled out "expeditiousness" as the sole consideration to be explored by the District Court (Appx. A, pp. 13a, 25a). Compare *Randell* v. *Newark Housing Authority*, 384 F. 2d 151, 154 (3 Cir. 1967); *Kelly* v. *Wyman*, 294 F. Supp. 893, 905 (S.D.N.Y. 1969), aff'd *sub nom., Goldberg* v. *Kelly*, 397 U. S. 254 (1970), where considerations of confidentiality of information were not altogether rejected.

It is worthy of note that the majority opinion in *Goldberg* v. *Kelly* recognized that "in this developing field of law any procedural requirements beyond those demanded by rudimentary due process" should not be imposed in advance of their necessity. 397 U. S. at 267. In the companion case, *Wheeler* v. *Montgomery*, 397 U. S. 280, 284 (1970), Chief Justice Burger in dissent, stated that courts should "wait until more is known about the problems before fashioning solutions in the rigidity of a constitutional holding." The Second Circuit failed to observe these admonitions in reaching its decision in the present cases.

II

In *Thorpe*, *supra*, this Court ruled that it would not make constitutional decisions on matters which had not reached the point where a concrete fact situation was presented for adjudication. The Court stated that it does not sit to ". . . decide abstract, hypothetical or contingent questions . . . or to decide any constitutional question in advance of the necessity for its decision . . ." (393 U. S. at 283-284).

Plaintiffs *Humphrey* and *Rolle* neither presented factual issues at the TRB hearing, in their Civil Rights Act complaints, nor in the affidavits they submitted on the Authority's motion to dismiss in the District Court. The cases are legion which hold that constitutional adjudication can only be given meaning by being applied to concrete facts in specific cases. See e.g. *Zemel* v. *Rusk*, 381 U. S. 1, 20 (1965); *Golden* v. *Zwickler*, 394 U. S. 103, 110 (1969). If constitutional adjudication depends upon facts, the facts before the Second Circuit did not support a case for finding that there was a denial of procedural due process. The Court of Appeals was therefore compelled to posit premises not relevant to the issues (e.g. improper use of tenant folder, inadequate notice, absence of findings) to reach its conclusion that procedural due process had been denied under the Authority's procedures. Compare the remarks of Mr. Justice Brennan in *Goldberg* v. *Kelly*, *supra*, and Chief Justice Burger in *Wheeler* v. *Montgomery*, *supra*, to the effect that constitutional holdings on questions of procedural due process should not be made in the absence of clear necessity for a court ruling.

In the present cases, the mere availability of the tenant folder to the TRB was cited to support the argument that due process had been denied, but substantive facts derogating from the Authority's basis for termination of tenancy were not adduced at any stage of the proceedings taken below. The factual basis for each termination action,

set forth in the respective affidavits of Ira S. Robbins, Vice-Chairman of the Authority for each case, and not controverted in each of the respective complaints by *Humphrey, Rolle* and *Escalera*, or by affidavit, presented a sufficient administrative basis under New York law for the termination of tenancy action taken by the Authority. *Willcox* v. *Stern*, 18 N. Y. 2d 195, 203, 219 N. E. 2d 401, 273 N.Y.S. 2d 38 (1966). Federal law on this subject is not to the contrary. *SEC* v. *Chenery Corp.*, 332 U. S. 194, 207 (1947); *United States* v. *Pierce Auto Freight Lines*, 327 U. S. 515, 535, 536 (1946). Accordingly, the Court of Appeals was not justified in dealing with the purported constitutional questions.

The Second Circuit, contrary to the holding in *Thorpe, supra*, and numerous other decisions of this Court, rendered an abstract, hypothetical opinion since the undisputed facts in each case of terminated tenancy rationally supported the Authority's determination. In this posture of the case, the Court of Appeals should have eschewed a Civil Rights Act decision in the cases. Compare *Conway* v. *California Adult Authority*, 396 U. S. 107, 110 (1969), where this Court stated that it would not render an "advisory opinion" on a "purely artificial and hypothetical issue". Accordingly, the prescriptions laid down by the Second Circuit for amplified notice, for cross-examination and findings, for availability of the tenant folder and the TRB Handbook, were extraneous to any constitutional issues presented in these cases and such rulings should therefore be set aside.

In mandating that tenants facing termination of tenancy be afforded cross-examination and confrontation, the Second Circuit ignored the rule of reason laid down by this Court in *Thorpe, supra*, 393 U. S. at 283-284. In the present cases the central fact, i.e., criminal convictions in *Humphrey* and *Rolle* and the presence of a dog in *Escalera*, rationally and adequately support the Authority's adminis-

trative determination. There is no material issue of credibility or of fact in any of these cases, and therefore there is no need for cross-examination. (Compare the judgment of the District Court in *Kelly* v. *Wyman*, 294 F. Supp. 893 (1969), aff'd *sub nom. Goldberg* v. *Kelly, supra*, Appendix C, p. 39a.)

The opinion of the Second Circuit made no concession to the possible variations in the circumstances of particular tenants where complaints of non-desirable activity or conduct were involved. Questions of cross-examination should be reserved for the appropriate factual situations. (See Authority Resolution, Appendix F, p. 58a, authorizing the Chairman of TRB to subpoena and swear witnesses.)

In addition, Mrs. Rolle refused to participate unless the conditions she laid down for conducting what she considered to be a constitutionally valid administrative proceeding by the TRB were met. This refusal to participate in an administrative proceeding where the tenant would be afforded an opportunity to state why the two convictions of the Rolle son should not be a basis for termination of tenancy precluded any favorable disposition in her case. (See *McKart* v. *United States*, 395 U. S. 185, 194-195 (1969); *SEC* v. *R. A. Holman & Co.*, 323 F. 2d 284, 287 (D. C. Cir. (1963)).

III

In holding that the availability of judicial review in the New York State Supreme Court in Article 78 proceedings does not satisfy the due process requirements of the Fourteenth Amendment, and that consequently, an adversary-type proceeding on the administrative level is required in terminating public housing tenancies, the decision below departs from established law. The New York Civil Practice Law and Rules (CPLR) require that when a pro-

ceeding is brought to challenge an administrative determination, the administrative body or officer is required to serve "... a verified answer, which must state pertinent and material facts showing the grounds of the respondent's action complained of." N. Y. CPLR 7804 (d). See also *Vinson* v. *Greenburgh Housing Authority*, 29 A. D. 2d 338, 339, 288 N.Y.S. 2d 159 (2d Dept. 1968), appeal argued May 28, 1970, N. Y. Court of Appeals.

New York case law requires that there be "factual support" for an administrative determination to be valid. *Farina* v. *State Liquor Authority*, 20 N. Y. 2d 484, 493, 231 N. E. 2d 748, 285 N.Y.S. 2d 44 (1967); *Sled Hill Cafe* v. *Hostetter*, 22 N. Y. 2d 607, 613, 241 N. E. 2d 714, 294 N.Y.S. 2d 497 (1968). Substantially similar provisions have been in effect in New York for over a century and have afforded full and fair review for many thousands of litigants who have challenged the action of an administrative body or officer. N. Y. CPLR 7803 (3) affords judicial review to aggrieved persons who claim that "a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion * * *".

In *Murray* v. *Murphy*, 24 N. Y. 2d 150, 157, 247 N. E. 2d 143, 299 N.Y.S. 2d 175 (1969), the dismissal of a police officer on grounds not charged against him was held to be in violation of due process. Under law established by this Court, the availability of such state judicial review has been deemed sufficient to meet the constitutional requirements of procedural due process, irrespective of whether faulty procedures were followed at the administrative level. *Thorpe* v. *Housing Authority of the City of Durham*, 393 U. S. 268, 284 (1969); *Toomer* v. *Witsell*, 334 U. S. 385, 392 (1948); *Bourjois, Inc.* v. *Chapman*, 301 U. S. 183, 189-190 (1937). However, the Second Circuit in the cases now before this Court ruled that claimed deficiencies in the Authority's administrative procedures could not be cured by the availability of judicial review in Article 78 proceedings in the New York

State Supreme Court. Although several district court decisions in the Second Circuit have held that Article 78 proceedings provide a satisfactory and sufficient mode of judicial review of administrative action, *Gold* v. *Lomenzo*, ~~cisions in the Second Circuit have held that Article 78 pro-~~ 304 F. Supp. 3, 9 (S.D.N.Y. 1969); *Muhammad Ali* v. *Division of State Athletic Comm. of New York*, 308 F. Supp. 11, 15 (S.D.N.Y. 1969); *Brockway* v. *Tofany*, 310 F. Supp. 266, 267 (S.D.N.Y. 1970), the court implicitly discredits the usefulness of such judicial review.

IV.

In respect to the putative claims asserted by *Lockman*, *Humphrey*, *Haywood* and *Escalera* regarding additional rent charges, the Second Circuit ruled that an adversary-type of hearing must be conducted by the Authority before such a rent charge can be asserted, notwithstanding that the Authority can establish its right to collect such charge, when contested by the tenant, only after a full-scale trial in the Civil Court in which the tenant can put in issue the legal validity of the charge, the factual basis upon which it is asserted, the amount of damages claimed, or any other defense.*

The additional rent charge is authorized by the lease agreement between the parties. The additional rent does not become a legally enforceable obligation against the tenant until there is a full, *de novo* trial in the Civil Court of the City of New York. The court has jurisdiction to decide against the Authority on the merits, and has done so. (See N. Y. Real Property Actions and Proceedings Law, § 743, Appendix M, p. 127a.)

* Note that this position of the court is directly at odds with its position in cases of termination of tenancy (*Escalera*, *Humphrey* and *Rolle*), that it was the unavailability of a full scale judicial trial upon all the issues that made an adversary-type administrative hearing essential.

The availability of a complete trial in the lowest echelon of the New York City court system necessarily negates the holding that an adversary-type hearing is required before the Authority may assert an additional rent charge. *Lichter* v. *United States*, 334 U. S. 742, 791-792 (1948); *Toomer* v. *Witsell*, 334 U. S. 385, 392 (1948). Moreover, the procedure followed by the project manager constitutes an investigative, pre-litigation process (See Appendix H, pp. 97a-99a) designed to help the Authority determine whether it will assert an additional rent charge, and therefore due process requirements are inapplicable. *Hannah* v. *Larche*, 363 U. S. 420, 441-442 (1960); *In re Groban*, 352 U. S. 330, 332 (1957).

The consequence of the decision is that before the Authority may even undertake to secure a judgment against the Humphreys for the toilet stoppage work it performed, it must conduct an adversary-type hearing to determine whether it should seek to recover the $3 charge in the Civil Court. Compare *Priebe & Sons* v. *United States*, 332 U. S. 407, 411-413 (1947). The Second Circuit advanced no sound, legal reason why two adversary-type proceedings must be pursued by the Authority in such instances. *Goldberg* v. *Kelly* on this specific point is to the contrary. 397 U. S. at 267, n. 14. At best the interests of the tenants are in the nature of property rights (*Phillips* v. *Comm.*, 283 U. S. 589, 596-601 (1931). There is no civil liberties issue such as freedom of speech, association, or religion, and the tenant has no right to invoke the jurisdiction of the federal court under 42 U.S.C. §1983. (See *Eisen* v. *Eastman*, 421 F. 2d 560 (2 Cir. 1969.)

V

The Second Circuit rejected the principle of abstention in the present cases. To the contrary such principle was recommended by the Court of Appeals for the Third Cir-

cuit in *Randell* v. *Newark Housing Authority*, 384 F. 2d 151, 157, n. 15 (1967), cert. denied, *sub nom. Avent* v. *Newark Housing Authority*, 393 U. S. 870 (1968), which involved termination of several tenancies for undesirability.

This Court, in ordering the application of abstention in *Reetz* v. *Bozanich*, 397 U. S. 82, 85 (1970), quoting from another case, recognized that: "'. . . state law problems are delicate ones, the resolution of which is not without substantial difficulty—certainly for a federal court.'" The record in the present cases shows that a complex scheme with detailed procedures for termination of tenancies has been established by the Authority in accordance with power granted under section 37(1)(w) of the New York Public Housing Law (McKinney Consolidated Laws, Book 44A). The courts of New York State should have the initial opportunity to appraise the validity of claims of violation of procedural due process in this developing field of law.

As the Third Circuit stated in *Randell*, *supra*, at page 157 n. 15, "the circumstances of this controversy make it particularly appropriate for state courts to act as the initial forum, both because of the federal legislative pattern itself gives primary responsibility to the states for establishment and administration of any low-rent housing project, 42 U.S.C. § 1401, and because the particular problems of administering low-rent housing evictions are closely tied to various landlord and tenant actions before the courts of the State of New Jersey." In the *Randell* case, on remand, the District Court applied the principle of abstention.

The courts of New York State have dealt with such problems before where public housing tenants have invoked the requirements of the First and Fourteenth Amendments. *Peters* v. *New York City Housing Authority*, 1 A. D. 2d 694, 147 N.Y.S. 2d 859 (2d. Dept. 1955);

Vinson v. *Greenburgh Housing Authority*, 29 A. D. 2d 338, 340-341, 288 N.Y.S. 2d 159 (2d Dept. 1968), appeal pending, N. Y. Court of Appeals; *Manigo* v. *New York City Housing Authority*, 51 Misc. 2d 829, 273 N.Y.S. 2d 1003 (1966), aff'd. 27 A. D. 2d 803, 279 N.Y.S. 2d 1014 (1967), lv. app. den. 19 N. Y. 2d 583, cert. denied, 389 U. S. 1008; *In re Williams* (*White Plains Housing Authority*), 62 Misc. 2d 613, 309 N.Y.S. 2d 454 (Sup. Ct. West. Cty. 1970).

In *Harrison* v. *NAACP*, 360 U. S. 167, (1959), a Civil Rights Act suit, abstention was sanctioned by this Court to allow the Virginia courts to rule in the first instance on the constitutional issues.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

June, 1970.

Respectfully submitted,

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Attorney for Petitioners.

HAROLD WEINTRAUB,
Of Counsel.

SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 343

NEW YORK CITY HOUSING AUTHORITY, IRA S. ROBBINS, SIMEON GOLAR and ARAMIS GOMEZ,
Petitioners,
against
PEDRO ESCALERA and ROSE ESCALERA,
Respondents.

NEW YORK CITY HOUSING AUTHORITY, IRA S. ROBBINS, SIMEON GOLAR and ARAMIS GOMEZ,
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against
ROSE LEE ROLLE,
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NEW YORK CITY HOUSING AUTHORITY, IRA S. ROBBINS, SIMEON GOLAR and ARAMIS GOMEZ,
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against
CLARENCE HUMPHREY, PHYLLIS HUMPHREY, and FANNIE HAYWOOD,
Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CRCUIT

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CRCUIT

Opinion Below

Since petitioner's brief was served, the opinion of the Court of Appeals in these cases has been reported at 425 F.

2d 852 (1970). In addition, the judgment of the Appellate Division, Second Department, in *Vinson* v. *Greenburgh Housing Authority*, 29 A D 2d 338 (1968), was affirmed without opinion by the Court of Appeals of New York on July 1, 1970 (N.Y.L.J., July 6, 1970, p. 2, col. 2).

ARGUMENT

A. These Cases Are Ripe For Review By This Court.

The action of the Court of Appeals is ripe for review by this Court because (1) categorical holdings in respect to significant procedural due process requirements pertaining to public housing authorities were rendered without significant qualification and (2) there are no genuine issues of material fact bearing on the constitutional questions raised by respondents. Despite contentions by respondents that the Second Circuit decision was made at the "pleadings" stage (Escalera-Rolle Brief, p. 6; Lockman-Humphrey Brief, p. 5), and that it is therefore not ripe for consideration by this Court, the Second Circuit ruled, in categorical terms, that:

> "First, summary notice such as that sent to the tenants here of the non-desirable conduct under consideration by the TRB is inadequate." (Appx. A to Pet., p. 14a; 425 F. 2d 853, at 862);
>
> "Second, denying tenants access to the material in their folders, when the entire folder is considered by the TRB in its determination of eligibility, deprives the tenants of due process." (Appx. A to Pet., p. 15a, 245 F. 2d at 862);
>
> "Third, denying the tenant the opportunity to confront and cross-examine persons who supplied information in the tenant's folder upon which HA action is grounded is improper." (*Id.*)
>
> "Finally, we find that the HA's failure to disclose the rules and regulations in the TRB Handbook govern-

ing the TRB panel at the hearing concerning termination for non-desirability may be found to be improper." (Appx. to Pet., p. 16a; 425 F. 2d at 863).

Although the last portion of the Court of Appeals holding does admit to some qualification as to the ultimate finding to be made by the District Court upon the trial of the actions, it is but a tangential issue (because the standards for determining non-desirable conduct are set forth in the Authority letter to the tenant setting the matter down for a hearing, see Appx. A, p. 6a; 425 F. 2d at 858), and serves only to underline the "law of the case" finality of the Court's holdings in respect to the other three matters on which it rendered judgment. The Court also ruled that the Authority's "procedures for terminating tenancies on the ground of violation of rules and regulations and for assessing additional rent charges" are constitutionally deficient in respect to the first three quoted matters (*Id.*).

Accordingly, something more than a bare remand to the District Court to consider and determine the issues between the parties under the Civil Rights Act was effected by the Second Circuit decision (Compare *Holloway* v. *Department of Housing and Urban Development*, 418 F. 2d 242, 5 Cir. 1969; *Nader* v. *General Motors Corp.*, 25 N. Y. 2d 560, 571, 307 N.Y.S. 2d 647, 656, 255 N. E. 2d 765, 1970, Breitel, J. concurring).

In reaching its decision, the Second Circuit had the Authority's printed procedures before it, supplemented by affidavits as to Authority practices executed by the Vice-Chairman of the Authority, Ira S. Robbins, Esq., and the Court relied on these and other materials, outside of the pleadings, in formulating its holdings (See 425 F. 2d at 857 n. 1; p. 858 n. 4; p. 860 n. 5; p. 863 n. 7;